STATE OF MICHIGAN

COURT OF APPEALS

In re COVERT, Minors.

UNPUBLISHED
July 20, 2017

No. 336569
Livingston Circuit Court
Family Division
LC No. 2015-015073-NA

Before: MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Respondent, K. Montrose, appeals by right the trial court's order terminating her parental rights to her children under MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.[1]

We review for clear error the trial court's factual findings in order to terminate parental rights. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). A finding will be determined "clearly erroneous" when, although some evidence may support it, the entire record creates the definite and firm conviction in the reviewing court that the trial court made a mistake. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We must give deference to the trial court's findings because of its special opportunity to judge the credibility of the witnesses who appeared before it. *Id.*; MCR 2.613(C).

Initially, respondent argues on appeal that petitioner failed to make reasonable efforts to reunite her with her children. Specifically, respondent contends that petitioner failed to make an adequate effort to help her secure suitable housing. We disagree.

Petitioner has a statutory obligation to make reasonable efforts to reunify parents and children. MCL 712A.18f(4); see also *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). A failure by petitioner to offer respondent a reasonable opportunity to participate in services creates a gap in the record that requires reversal of an order terminating parental rights. *In re Mason*, 486 Mich 142, 158-160; 782 NW2d 747 (2010). However, a respondent also has a responsibility to participate and benefit from the services offered by petitioner. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

[1] The trial court also terminated the parental rights of D. Covert, the children's father. D. Covert has not appealed that decision and is not a party to this appeal.

Respondent was offered numerous services, including parenting classes, substance abuse evaluation, and domestic victim violence counseling. Respondent's argument seems to be that petitioner was required to find and provide her with suitable housing. No such requirement exists. In this case, respondent's own testimony established that she moved frequently and consistently made poor choices about the persons with whom she lived. In addition, respondent acknowledged that her sister offered her the use of a three-bedroom home, with respondent's sole obligation to pay the utilities. Respondent stated that she did not accept the offer because the stairs in the home were steep. Respondent lacked suitable housing for the children due to her own actions, not to a lack of availability or a lack of effort on petitioner's part. *In re Frey*, 297 Mich App at 248.

Next, respondent argues that she was denied the effective assistance of counsel during the proceedings. Because respondent did not raise the issue of counsel's performance before the trial court and did not move for a remand in this Court, our review is limited to mistakes apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

The principles of ineffective assistance of counsel in criminal cases apply by analogy to proceedings to terminate parental rights. *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999). The question whether respondent was deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). Counsel is presumed to have afforded effective assistance, and respondent has the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must also have resulted in prejudice. To demonstrate prejudice, respondent must show a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Id*. In short, respondent must show that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Respondent makes general arguments regarding counsel's performance. She seems to assert that counsel should have argued that reasonable efforts were not being made to reunite her with her children, but she does not suggest what specific points counsel should have raised. Respondent notes that at the termination hearing counsel called only one witness, did not engage in extensive cross-examination of petitioner's witnesses, and did not make an opening statement or closing argument.

Counsel has wide discretion in matters of trial strategy. *Heft*, 299 Mich App at 83. Decisions as to what arguments to present or questions to ask of witnesses are matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). The failure to make certain arguments or ask questions constitutes ineffective assistance only when it deprives a person of a substantial defense. *Id*. A substantial defense is one that might have changed the outcome of the proceedings. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Respondent makes no suggestions as to what counsel could have argued or what questions counsel could have asked that would have made a difference in the outcome of the proceeding.

Respondent has not carried her burden of showing that counsel's performance deprived her of a substantial defense, and so she has not shown prejudice. *Carbin*, 460 Mich at 600.

Next, respondent argues that the trial court erred by taking judicial notice of certain proceedings, specifically a criminal case against respondent D. Covert, and her brother's termination of parental rights case. Because respondent did not object to the court's taking judicial notice of these materials, she did not preserve this issue for appellate review. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). An unpreserved evidentiary claim is reviewed for plain error affecting substantial rights. *Id.*; MRE 103(a), (d). An error affects substantial rights if it affects the outcome of the proceedings. *In re Utrera*, 281 Mich App at 9.

To take judicial notice of certain files, the trial court cited MCL 600.2106, which provides:

> A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court of this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and all of the facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

The trial court also cited MRE 201, which provides in pertinent part:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts, and does not preclude judicial notice of legislative facts.
>
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Child protection proceedings are one continuous proceeding. *In re Gillespie*, 197 Mich App 440, 446; 496 NW2d 309 (1992). The trial court was not required to take judicial notice of the files in this case, but it did not err by stating that it did so.

In addition, respondent has not shown that the trial court committed plain error by taking judicial notice of other proceedings. Respondent did not object or ask to be heard on the issue. Moreover, the trial court's written decision makes no mention of the other proceedings when setting out the evidence that supported termination of respondent's parental rights; the decision relies almost entirely on respondent's own testimony. Nothing respondent argues would support a finding that the outcome of the proceedings was affected by the trial court's taking judicial notice of other proceedings. *In re Utrera*, 281 Mich App at 9.

Finally, respondent argues that the trial court clearly erred in finding that termination of her parental rights was in the children's best interests.[2] We disagree. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). In determining a child's best interests, the trial court may consider the child's need for stability and permanency and whether the child is progressing in his or her current placement. *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011). In addition, the trial court may consider the children's bond to the parent, the parent's parenting ability, and the advantages of a foster home over the parent's home. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).

At the time of the termination hearing, the children had been in foster care for more than one year. Respondent stated that she would be ready to care for her children in six months. However, the trial court found that respondent was not honest about her ongoing substance abuse, failed to benefit from the services provided to her, and did not recognize her parenting deficiencies. Indeed, although she engaged in domestic victim violence counseling, she did not implement what she learned and became involved with an abusive man with whom she intended the children to live. Moreover, the child welfare specialist stated that the children were doing well in their foster care placement and that their foster parents worked consistently to give them structure and guidance and to address their educational and health needs. The trial court acknowledged that respondent and the children had a bond, but found that respondent's inability to benefit from services and the structure and stability offered to the children by the foster parents outweighed the bond. The trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. MCL 712A.19b(5).

We affirm.

/s/ Jane E. Markey
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[2] Respondent does not challenge the trial court's determination that clear and convincing evidence supports the statutory grounds for termination.